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SUPREME COURT of the UNITED STATES
October Term , 1969 .

Nationwide Theatres Investment Co. Petitioner

vs

James E. Thompson Respondents
United Artists Theatre Circuit Inc.

Nationwide Theatres Investment Co. Petitioner
et al .

vs

United Artists Theatre Circuit Inc. Respondents

Petitioners seek certiorari to review the judgme
of the Court of Appeals for the Second Circuit i
this case , and , in support of their petition ,
respectfully show :

OPINION BELOW and JURISDICTION

The District Court rendered no opinion , only
a memorandum , see Appendix A . The Court of
Appeals rendered no opinion , only a memorandum ,
see Appendix B .

The application for Certiorari is based on (a) the judgement of the Court of Appeals is contrary to the controlling decisions of the Supreme Court , (b) the existence of conflict between circuits on the issue of whether the granting or denial of a Transfer Motion constitutes a ' final order ' and (c) the failure of the Court of Appeals to render a judgment consistent with the justice of the cause .

JURISDICTION OF THE COURT lies under - -

Rule 17 (b)
28 U S C A 1291 , 1292 (b)
28 U S C A 1651 (a)
28 U S C A 1254 (1)

QUESTIONS PRESENTED

1. Should certiorari issue , when the judgment and order of a Court of Appeals is at variance and contrary to decisions of the Supreme Court .

2. Should certiorari issue , when there exists a conflict between circuits on the substantive procedural methods of appeal under 28 U S C A 1291 , 1292 , on the meaning , interpretation , and application of 28 U S C A 1404 (a) .

When the Second Circuit recognized the existence of a conflict on this subject , as stated in Olinick vs Demster 365 F (2) 439 - page 442 , col. 2 ,

" The Courts of Appeals have been far from unanimous in deciding whether # 1292 (b) is available to one seeking to review the disposition of a # 1404 (a) transfer motion for erroneous evaluation of proper factors.

The FIFTH CIRCUIT stoutly affirms that it is available, and that mandamus is accordingly inappropriate . Humble Oil & Ref. Co. vs Bell , 321

F (2) 53 (5th Cir 1963) ; In re Humble Oil & Ref Co. 306 F (2) 567 (5th Cir.1962).

The THIRD and SIXTH CIRCUITS just as stoutly hold that it is not available. Standard vs Stoll Packing Corp. 315 F (2) 626 (3rd Cir. 1963) ; Bufalino vs Kennedy, 273 F (2) 71 (6th Cir. 1959

We have not addressed ourselves directly to the problem although we have suggested that " orders granting or denying motions for tranfers pursuant to the provisions of 28 U S C A 1404 (a) are not appealable except by resort to mandamus . Grossman vs Pearlman 353 F (2) 284 (2nd Cir. 1965) "

3. Should certiorari issue , to establish uniformity in procedural appeal and interpretation of 28 U S C A 1291 , 1292 , in their application to 28 U S C A 1404 (a) .

4. Should ceriorari issue , to review an abuse of discretion by a Court of Appeals in failing to invoke the ALL WRIT STATUTE 28 U S C A 1651 , and consider an appeal as a Writ of Mandamus , when the justice of the cause and the overriding merits of the issue prevail in favor of an appellant .

5. Should certiorari issue , to review an order of a District Court denying Motions to Transfer and in alternative to Stay , as being a ' final order from which an appeal of right can be taken to the Court of Appeals for review .

6. Should certiorari issue , to review an abuse of discretion by the District Judge , to rule on Motion to Transfer and in alternative to Stay , without addressing himself to the merits of the motion and predicating his ruling that the motions were made " on the eve of trial " when the facts of record show that the action had not been pre-tried, that the agreed to depositions had not been fully taken and concluded , and that the action had not been assigned for trial .

7. Should certiorari issue , to review whether an Ohio action on a contract pertaining to Ohio land and providing that the contract shall be interpreted by Ohio law and FIRST Filed , does as a matter of right entitled to precedence in trial over a SUBSEQUENT FILED action between the same parties and on the same subject matter in a foreign U. S. District Court .

8. Should certiorari issue , to review the failure of the District Court to rule on Motion to Dismiss under 28 U S C A 1359where the issue is raised by defendant of collusion by plaintiffs to confer jurisdiction on the court .

STATUTES INVOLVED

28 U S C A 1291 , 1292 , whether 28 U S C A 1404 (a) is a final order , and the subject of an appeal .

28 U S C A 1404 (a) , whether there is a time limitation to a filing under this section , and whether under the facts herein , the motion was timely filed .

28 U S C A 1359 , whether a Motion to Dismiss for collusion to confer jurisdiction , a ruling thereon is mandatory .

STATEMENT OF CASE

January 13, 1966 , Nationwide Theatres Investment Co. (NTIC) entered into contract with United Artists Theatre Circuit Inc. (UATC) for the lease of land at Northampton (Akron) Ohio , and the construction of a drive-in theatre complex on the land . NTIC claim it was induced to enter into contract by firm representations made to it by UATC on the cost of construction .

March 27, 1967 . UATC having cancelled contract, NTIC filed suit in the Court of Common Pleas ,

Cuyahoga County , Ohio , premised on fraud and
representation in inducement. UATC counter-clai

May 4, 1967 , James E. Thompson (Thompson)
filed suit in U. S. D. C. S. D. N. Y. against
and NTIC for architectural fees, UATC filed Thir
Party claim against NTIC. NTIC counter claim

January 15, 1968 , UATC filed suit against N
in U. S. D. C. S. D. N. Y. NTIC counter claim

January 18, 1968 , Thompson and UATC suits c
solidated .

October 7, 1969 , Motion by NTIC to Dismiss
tions , and/or in alternative to Transfer and/o
in alternative to Stay . see Appendix "C"

Affidavit in support of Motions , see Append

October 28 , 1969 , District Court , Motion
denied , see Appendix "A" for court's entry

December 18, 1969 , Appeal perfected to 2nd

February 24, 1970 , Court of Appeals , Moti
to dismiss for lack of jurisdiction , granted .

March 22, 1970 , Notice of Appeal to United
States Supreme Court filed by NTIC .

April 4, 1970 , Court of Appeals , Motion t
Stay , overruled .

April 7, 1970 , Certified record transmitte
by Court of Appeals to U. S. Supreme Court .

ARGUMENT

This Court has in numerous cases held , that a conflict between Courts of Appeal on a given subject , is ground for the granting of certiorari to resolve inter-circuit disparity and to promote uniformity in federal procedure .

Counsel will not burden the record with historical past background decisions , but shall confine himself to current and recent decisions of this Court .

CONFLICT ' BETWEEN CIRCUITS ON WHETHER GRANTING OR DENYING OF MOTION TO TRANSFER IS A " FINAL ORDER " UNDER 28 U S C A 1291 and 1292 (b) .

In this case , the 2nd Circuit , held it not to be an appealable order . This consistent with its holding in Olinik vs Dempster 365 (2) 439 .

The 3rd Circuit , is of the same opinion , Standard vs Stall Packing Co. 315 F (2) 626 .

The 6th Circuit , is of the same opinion , Bufaline vs Kennedy , 273 F (2) 71 .

HOWEVER , THE 5th CIRCUIT , IS OF A CONTRARY OPINION , HOLDING THAT IT IS , Humble Oil & Ref. Co. vs Bell Marine Service Co. 321 F (2) 53 , and In re Humble Oil & Ref. Co. 306 F (2) 567 .

A discussion and excerpts of Olinik vs Dempster , supra , is setforth under ' Questions Presented ' Item No. 2.

CERTIORARI ALLOWED - TO RESOLVE CONFLICT BETWEEN COURTS OF APPEAL .

Cheng Fa Kwok vs Immigration & Naturalization Bur. 392 U. S. 206 , 88 S. Ct. 1970 .

- because Courts of Appeal have disagreed as to the proper construction of pertinent statutory provisions -

Hanna vs Plumer , 380 U. S. 460 , 85 S. Ct. 1136

- because of the threat to the goal of uniformity of federal procedure posed by the decision below -

Layne & Bowler Corp. vs Western Wells Works
261 U. S. 387 , 42 S. Ct. 422

- where there is a real and embarrassing conflict of opinion and authority between Courts of Appeal

Willingham vs Morgan , 89 S.Ct. 1813

- where opinion was in apparent conflict with at least three other Courtsof Appeal decisions erroneously decided the removal suit by a federal prisoner .

Harris vs Nelson , 89 S. Ct. 1082

- because of importance of questions presented and diversity of views among the district and appellate courts -

Snyder vs Harris , 89 S. Ct. 1053

- conflict decisions of Courts of Appeals -

McCarthy vs U. S. 89 S. Ct. 1166

- conflict in Courts of Appeal over effect of District Court's failure to follow provisions of rule.-

U. S. vs Carroll , 88 S. Ct. 442

- in order to resolve conflict among circuits on recurring questions of federal income taxes -

F T C vs Flotill Products Inc. 88 S. Ct. 401

- Conflict with decisions of other Courts of Appeal compelled Supreme Court to grant certiorari for review of decision of Court of Appeal -

Wyandotte Transport Co. vs U. S. 88 S. Ct. 379

- conflict among circuits and because of the important question interpreting of U. S. statute.

U. S. vs RAND 88 S. Ct. 265

- seeming conflict between decision of Court of Appeals and prior opinion of the Supreme Court-

Denver R.R. Co. vs Brotherhood of R.R. Trainmen 87 S. Ct. 1746

- conflict between Courts of Appeal -

Toilet Goods Assocation vs Gardner , 87 S. Ct.15 20

- apparent conflict between decisions of Courts of Appeal - 2nd & 3rd circuits .

First National Bank vs Walker Bank & Trust Co. 87 S. Ct. 492

- conflict between decisions of different circuits on construing statute relating to banking-

Immigration & Naturalization Service vs Errico 87 S. Ct. 473

- conflict between Courts of Appeal on immigration laws -

U. S. vs Catto , 86 S. Ct. 1311

- conflict between 5th , 8th and 9th circuits.-

CERTIORARI ALLOWED - TO RESOLVE ' APPARENT ' CONFLICT

Avco Corp. vs Aero Lodge 88 S. Ct. 1235

- because of apparent conflict between Court of Appeal's decision below and decision of Court of Appeals of another circuit -

Toilet Goods Association vs Gardner , supra .

THE JUDGEMENT AND ORDER OF THE 2nd CIRCUIT DISMISSING THE APPEAL FOR LACK OF JURISDICTION IS CONTRARY TO DECISIONS OF THE SUPREME COURT , ON WHAT CONSTITUTES A ' FINAL ' ORDER UNDER 28 U S C A 1291 , 1292

This Court has numerously declared the rule - - - holding many orders as final and appealable, which left open major questions in litigation but were nevertheless " in that small class which finally determine claims of rights seperable from, and collateral to , rights asserted in the action , too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated " .

Cohen vs Beneficial Loan Corp. 337 U. S. 541
Roberts vs U. S. District Court 339 U. S. 844
Brown Shoe Co. vs U. S. 370 U. S. 294
Swift & Co. vs Compania Colombiana Del Caribe 339 U. S. 684

This case , the denial of an appeal from a refusal to Transfer and Stay , clearly falls within that cla noted in the above citations .

The issue of Transfer and Venue having been raised, an order thereon , is clearly ' final ' and ' appealable', and on the denial thereof , this Court has issued certiorari .

Mercantile Bank vs Langdeau , 371 U. S. 555 .

- venue decision is a final judgment , appealable to the United States Supreme Court under 28 USC 12 57 (2) , the issue being seperate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action -

State of Georgia vs Rachel 86 S. Ct. 1783

- certiorari granted , to consider applicabilit of removal statute to circumstances of the particular case -

Pure Oil Co. vs Suarez 86 S. Ct. 1394

- certiorari granted to determine whether Court of Appeals decision was inconsistent with Supreme Court decision pertaining to VENUE -

see also - First National Bank vs Cities Service Co. 88 S. Ct. 1575

Fleischman Distilling Corp. vs Maier Brewing 87 S. Ct. 1404

ERTIORARI GRANTED - TO CONSIDER " STAY "

The District Court failed to rule on petitioners otion to Stay proceedings pending the trial in the ourt of Common Pleas of Cuyahoga County , Ohio .

This failure to rule , amounting to a denial , is matter for review by this Court .

Kaiser Steel Corp. vs W. S. Ranch Co. 88 S. Ct. 1753 .

HIS COURT WILL GRANT CERTIORARI , EVEN THOUGH COURT f APPEALS REFUSED TO ENTERTAIN THE APPEAL .

620 Church Street Building Corp. 299 U. S. 24 , 57 S. Ct. 88

- where a court of appeals has refused to review a case , and thus the case has never been " in " the Supreme Court as required for the statutory writ of certiorari , 28 U S C A 1254 , the Court may issue a common law writ of certiorari on which it can review the action of the court of appeals in refusing to entertain the appeal , and can determine the merits of the case.

Jenkins vs McKeithen , 89 S. Ct. 1843

- question of plaintiff's standing goes to Supreme Court's jurisdiction , and Supreme Court must decide issue , even though court below passed over it without comment .

CERTIORARI SHOULD BE ALLOWED , TO REVIEW THE PROPRIETY AND CORRECTNESS OF THE DISTRICT COURT IN RULING ON A MOTION TO DISMISS BECAUSE OF COLLUSION BETWEEN PLAINTIFFS TO CONFER JURISDICTION ON THE FEDERAL COURTS - 28 U S C A 1359 .

The District Court denied the motion to dismiss without a determination on the merits , predicating his ruling on a ' stipulation ' between counsel on venue , but failing to take into account , that in the stipulation that defendants (petitioners herein) SPECIFICALLY RESERVED THE RIGHT TO OBJECT TO JURISDICTION

Irregardless of any stipulation , the issue of collusion to confer jurisdiction having been raised , the District Court was required to hold appropriate hearings and render a decision on the merits.

Cerri vs Akron People's Telephone - 219 Fed. 285

- it's obvious purpose and policy was not to permit the jurisdiction of federal courts in any case to be subject of collusive arrangement between parties -

Steinberg vs Torro - 95 F. Supp 791

Ferra vs Philadelphia Laboratories
393 F (2) 934

Hartog vs Memoray - 116 U. S. 588

Lehigh vs Kelly - 160 U. S. 327

CONCLUSION

This case presents issues of major importance in the procedural administration of justice in the Federal Courts.

That there exists a conflict between Courts of Appeals in the interpretation and administration of appeal statutes , and decisions made contrary of those of this Court .

That petitioners have been deprived of just and full hearings .

Therefore , this Honorable Court should grant a writ of certiorari .

Respectfully submitted

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Attorneys for Petitioners

Prepared by -
David A. Thomas
April 24, 1970

APPENDIX "A"

DECISION OF DISTRICT COURT
New York , October 28 , 1969 .

Before : Hon. Edward Weinfeld , District Judge .

The Court : This motion is made after the matters have been at issue for some time. The motion with respect to the venue question is denied . It appears that a stipulation was entered into sometime ago , which clearly was a waiver of the present contention made with respect to collusive jurisdiction .

The motion for a transfer under Section 1404 (a) likewise appears to have been made on the eve of trial and , accordingly is also denied .

The motion to appear pro se is likewise denied .

It appears that the moving party necessarily will be a material witness with respect to matters that go to the substance of the litigation .

APPENDIX "B"

UNITED STATES COURT OF APPEALS
Second Circuit

It is hereby ordered that upon consideration of the motion by counsel for James E. Thompson and United Artists Theatre Circuit Inc. appelles , by notice of motion dated February 13, 1970 to dismiss the appeal from the United States District Court for the Southern District of New York for lack of jurisdiction or in the alternative to extend the time to file the brief and appendix to the briefs to and including 30 days after the determination of the motion to dismiss, that the motion to dismiss be and it hereby is granted .

February 24, 1970 .

MOTION TO DISMISS ACTIONS AND/OR IN ALTERNATIVE TO TRANSFER AND/OR IN ALTERNATIVE TO STAY PROCEEDINGS.

(Filed October 7, 1969.)

For brevity, throughout motion, brief and affidavit, James E. Thompson will be referred to as Thompson, United Artists Theatre Circuit Inc. as United, Nationwide Theatres Investment Co. as Nationwide, and David A. Thomas and Berton Raden Thomas as Thomas'.

Third-party-defendants and also defendants Nationwide and Thomas' move that the above actions be:

1. dismissed for want and lack of proper and/or venue under U. S. C. A. 28 #1359 and #1391 (a) (b) (c), and #1406 (a).

(a) Plaintiff Thompson does not reside in this District, but in fact resides in Somerset, New Jersey, in the U. S. District of New Jersey.

(b) Defendant United is incorporated in the State of Maryland, with its corporate offices in that state, while maintaining divisional offices in New York.

(c) Third-Party-Defendants and Defendants Nationwide and Thomas' do not reside or maintain offices in New York or in this district, but in fact reside and office in Cleveland Heights, Ohio in the U. S. Northern District of Ohio, Eastern Division.

2. and/or that the actions be transferred under U. S. C. A. 28 #1406 to the U. S. D. C. Northern District of Ohio, Eastern Division, in which the action could and should be brought; and for the convenience of parties and witnesses, and in the interest of justice, under U. S. C. A. 28 #1404 (a).

3. and/or that the actions be stayed, pending the outcome and decision in a previously filed action, namely, March 29, 1967, in the Court of Common Pleas of Cuyahoga County (Cleveland) Ohio, wherein the prime and controlling facts are at issue, and where the issues have been joined, and an early trial on the merits is anticipated.

4. That the filing of these actions in this Court were collusively made and conspiratorially contrived between Thompson and United to invoke the jurisdiction of this Court, and being contrary to U. S. C. A. 28 #1359.

5. The motions herein are made upon the facts set forth in the attached affidavit, namely, forum non conveniens, convenience of your petitioners, convenience of witnesses, relative ease of access to sources of proof, convenience in viewing land premises and effect of the alleged defect in title to the land the actual subject of the lease from Nationwide to United, availability to compel attendance of unwilling witnesses, the diminishing of cost to obtain attendance of willing witnesses, the availability of engineering, court records, and contractors data, and that the litigation can be tried more expeditiously and inexpensively in northern Ohio, and for the further reason, that the contract the crux of the actions, is by its express terms to 'be governed by and construed in accordance with the laws of the State of Ohio'.

Respectfully submitted,

DAVID A. THOMAS,

Attorneys pro se for Nationwide Theatres Investment Co., David A. Thomas, Berton Raden Thomas.

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS ACTION, AND/OR IN ALTERNATIVE TO TRANSFER, AND/OR IN ALTERNATIVE TO STAY PROCEEDINGS.

STATE OF OHIO,
COUNTY OF CUYAHOGA, SS.

David A. Thomas, being duly sworn, deposes and says:

1. I am a member of the Bar of the State of Ohio, in good standing and authorized to practice in the state courts, in the U. S. District Court, Northern Ohio District, Eastern Division, and in the U. S. Court of Appeals, Sixth Circuit.

That in the instant matter, I am acting as pro se counsel for Nationwide Theatres Investment Co., Berton Raden Thomas and myself.

That in a companion case, 67 Civ. 1389, United Artists Theatre Circuit Inc. vs. Nationwide Theatres Investment Co., Berton Raden Thomas and David A. Thomas, deponent was introduced to Judge McGoheny, and was granted the right and privilege to appear and act as counsel pro se for all named defendants, and without any objection from opposing counsel.

2. That I am president of Nationwide, and have full personal knowledge of the facts and circumstances of this matter.

3. That the causes of action, are based on a written contract of lease and construction, with Nationwide as lessor of the land and Northampton Thomas Construction & Development Corp. a subsidiary, and with United as lessee and ultimate purchaser of the improvements, to-wit a drive-in theatre complex, and with Thompson the designated architect.

That Thompson had sued for alleged architectural fees, first joining United and Nationwide as joint defendants. Subsequently Thompson dismissed as against Nationwide.

That United filed a third-party complaint against Nationwide for recoupment of any judgment rendered against it, and subsequently sued Nationwide and the Thomas' for monies paid under the lease and construction contract.

That subsequently thereafter Thomas filed an amended complaint against Nationwide for the architectural fees, in the same context as contained in the complaint previously dismissed.

That to Thompson's complaint, Nationwide filed an answer denying liability, and to United complaint filed an answer and cross-complaint.

4. That in defense to the complaints, and in support of its counter claim, Nationwide and Thomas' will call as witnesses:

1. John M. Peters, 942 Simich Dr., Cleveland, Ohio, to give testimony (a) inefficiency, incompleteness and inadequacy of the plans and specifications submitted by Thompson, exaggerated ground elevations and contours and water treatment, and (b) that the commitment for architectural fees was that of United, contingent on actual construction and with payment confined to proceeds from the construction loan, and (c) that any liability by Nationwide to Thompson was limited to actual traveling expenses.

2. John R. Quine, 611 W. Market St., Akron, Ohio, attorney and officer of the First Akron Development Corp. the owners of the fee estate of the subject land (a) that at the instance of United the original 99 year lease on the whole of the land, was separated and divided into two 99 year leaseholds, and (b) that any alleged title defects pertain *not* to Lease "B" the parcel sub-leased to United, and (c) that action to quiet title had been instituted and/or steps were being taken to cure the same.

3. John B. Hunter, 611 West Market St., Akron, Ohio, president First Akron Development Co., for substantive testimony as that of John R. Quine, also on title report issued by First Akron Corporation, Title and Guaranty Division.

4. Denver Collins, Marshall C. Rardin & Sons, 1545 Tonawanda Avenue, Akron, Ohio, to give testimony on bid submitted for the ground work, and suggested options to change design and lower the costs.

5. Other employees of Rardin & Sons, whose names are presently unknown to deponent.

6. Pete Boyas, Boyas Excavating Inc., 2609 Monroe Ave., Cleveland, Ohio—to give substantially the same testimony as Mr. Collins, but limited to his submitted bid.

7. Eric Thompson (no kin to Thompson—plaintiff) Deputy Engineer, Summit County Engineering Dept., Akron, Ohio, will testify, that at the instance and on consultation with James E. Thompson, the route of Mud Brook Interceptor Sewer was changed and modified to avoid crossing of land leased to United (Lease B) and rerouted on Lease A land, effecting its value and use.

8. Other employees of the Summit County Engineering Dept. for corroborative evidence to that of Mr. Eric Thompson.

9. Perry Hamilton, Land Title and Trust Co., Ontario Ave., Cleveland, Ohio, will give testimony on (a) the deposit in escrow of executed leased "A" and "B", and (b) on the nature of the title and the alleged defects, and that same pertained solely to Lease "A" and not the land sub-leased to United.

10. David Lewin, The Arcade, Cleveland, Ohio, on soil tests made on subject land, his finding and results and effects, as effecting the contours made by Thompson.

11. Joseph P. Miller, First National Bank, Akron, Ohio, to give testimony that National had negotiated for a construction loan to build the subject drive-in theatre complex, and to repaid on completion by United.

12. Berton Raden Thomas, Cleveland and Tampa, Florida, who will testify on all aspects of the complaints, cross-petition, cost representation made by United to Nationwide and Thomas', namely, that the drive-in thea-

tre complex would be designed so as to be construction at a cost not to exceed $800,000, and that Thompson agreed to prepare drawings and plans on a contingency of actual construction and actual leasing, and that the liability of Nationwide to Thompson was limited to actual traveling expenses which Nationwide did pay.

13. That the cumulative and substantive effect of the testimony of the above named witness are vital to Nationwide and Thomas' and will clearly show that the complaints of Thompson and United are without merit.

That it will be most costly and expense to have and/or compel their attendance in the Southern New York district.

14. That Thompson is licensed in Ohio, does business in Ohio, and frequently comes to Ohio.

That United is licensed to do business in Ohio, and has a statutory agent upon whom service can be made.

That Nationwide is an Ohio corporation with offices at Cleveland, and that David A. Thomas and Berton Raden Thomas are legal residents of Ohio, residing at Cleveland Heights, Ohio.

DAVID A. THOMAS.

Sworn to and subscribed in my presence this 29th day of September, 1969.

LOUIS N. FARR
Notary Public
Commission Expires 2-1-74